ute was a public or a private one; for if the latter, the act would be unreasonable. Admittedly, land may be taken for a public park or for a public square or boulevard under the right of eminent domain, and the public moneys raised by taxation may be expended in beautifying such places. And of course both eminent domain and taxation must be for a public use. Thus it is clear that a legislative purpose is none the less a public one because it is for the adornment and beautifying of a city. So here the avowed object of this act was to "save the dignity and beauty of the city at its culminating point for the pride of every Bostonian and for the pleasure of every member of the state." And the criterion of what is a public use is certainly the same in the exercise of the police power as it is in taxation and eminent domain. Thus the statute in question being a reasonable regulation, — its reasonableness seems unquestionable, — and for what is now generally recognized as a public use, although working harm, perhaps, to those affected by its provisions, might well have been considered a constitutional exercise of the police power of the state.

RECENT CASES.

BANKRUPTCY — ASSIGNMENT FOR BENEFIT OF CREDITORS — LEASES. — *Held*, that an assignee for benefit of creditors does not, by accepting the trust, necessarily become assignee of a lease of the debtor, but may within a reasonable time elect to reject it. *Wilder* v. *McDonald*, 59 N. E. Rep. 106 (Ohio).

A general assignment is sufficient to pass title to a lease, though it be not specifically mentioned. *Lowe* v. *Mason*, 140 Ill. 108, 113. And ordinarily the assignee of a lease, by accepting the deed, is held to accept the lease and render himself liable to its burdens. *Smith* v. *Goodman*, 149 Ill. 75, 80. However, it has become well established in this country, in accord with the present case, that an assignee for the benefit of creditors by accepting the deed merely accepts the trust, and that therefore he may enter upon the execution of the trust without becoming assignee of the lease, unless he elects to do so within a reasonable time. *Smith* v. *Goodman, supra; United States Trust Co.* v. *Wabash Western Ry. Co.*, 150 U. S. 287, 289. BURRILL, ASSIGNMENTS, 5th ed. 596. This is analogous to the universal rule as to trustees in bankruptcy. *Hanson* v. *Stevenson*, 1 B. & A. 305. On principle, it seems entirely sound, for, in view of the purpose of the assignment, it cannot be within the scope of the trust to accept burdensome property which goes to diminish the fund arising from other sources, and tends to defeat the object of the assignment.

BANKRUPTCY — EXEMPTIONS — LIFE INSURANCE POLICIES. — The Bankrupt Act of 1898, § 6, provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws." § 70 vests the bankrupt's title to property in the trustee "except in so far as it is exempt, provided that if he assures to the trustee the cash surrender value of any insurance policy payable to his estate, he may hold the policy free from the claims of creditors; otherwise the policy shall pass to the trustee as assets." The bankrupt held a policy in his own favor which was exempt under the state law. *Held*, that the policy, in the absence of security for its cash surrender value, passes to the trustee as assets. *In re Scheld*, 104 Fed. Rep. 870 (C. C. A., Ninth Cir.).

Held, that such a policy is exempt in proceedings under the Act. *Steele* v. *Buel*, 104 Fed. Rep. 968 (C. C. A., Eighth Cir.).

This question was first considered by a district court of the eighth circuit, and it was held that the policy was not exempt. *In re Lange*, 91 Fed. Rep. 361. That early decision is relied upon in the first of the cases above, and has been accepted without discussion of its merits by all the text-writers. LOVELAND, BANKR., p. 511; LOWELL,

BANKR., p. 320. *In re Lange, supra*, is, however, overruled in the second of the principal cases, which is an appeal from a similar decision of the same court. The authorities in favor of the first case, therefore, are not formidable, and upon principle it seems clearly unsound. The language of § 6 could not more forcibly declare the rule of exemption for the entire act. The intent to make an exception thereto should be evinced with equal certainty. The limitation in § 70, "except as to such property which is exempt," seems to recognize the paramount authority of § 6, and to disclaim any intention to create any exceptions thereto. Such an interpretation retains the rule of the preceding act as to exemptions, while at the same time lessening the hardship where by the state law no exemption is allowed. *In re Sawyer*, Fed. Cas. No. 12393.

BANKRUPTCY — JURISDICTION — RIGHTS OF CREDITORS. — Before adjudication in involuntary bankruptcy proceedings, the petitioning creditors applied to the bankruptcy court for an injunction to restrain a third party from disposing of property in his possession alleged to belong to the bankrupt. *Held*, that the Federal courts have no jurisdiction in such a case without the consent of the defendant. *In re Ward*, 104 Fed. Rep. 985 (Dist. Ct., Mass.).

In a number of early cases this jurisdiction was sustained. *In re Rockwood*, 91 Fed. Rep. 363; *In re Gutwillig*, 92 Fed. Rep. 337. The court, however, regards these cases as overruled by *Bardes* v. *Hawarden Bank*, 178 U. S. 524. That case decided that under § 23 b the bankruptcy courts have no jurisdiction over plenary suits by the trustee without the consent of the defendant. But it may well be contended that the effect of the decision has been overestimated. Granted that the trustee, being incapable of bringing plenary suits, cannot be allowed to obtain a temporary injunction in the bankruptcy courts, there seems to be no reason to apply the restrictions imposed upon the trustee to a suit by the creditors. The trustee is only slightly inconvenienced by being compelled to bring suit in the state courts, but the creditors would practically be deprived of all remedy, for it is exceedingly doubtful if an injunction could be obtained from the state courts upon a suggestion of possible bankruptcy. The omission of creditors from § 23 b and the provisions of § 2 (15) seem to indicate an intention to provide a remedy for just such a case.

BILLS AND NOTES — AGENT FOR COLLECTION — DEDUCTION FOR PAST INDEBTEDNESS OF AGENT. — The plaintiff, having a check drawn on the defendant bank, indorsed it in blank and gave it to his father, with instructions to collect it. The bank, thinking it belonged to the father, with his consent deducted a debt due from him. *Held*, that the plaintiff may recover the amount so deducted. *Percival* v. *Strathman*, 84 N. W. Rep. 929 (Iowa).

The transaction here amounted to full payment of the check by the bank, and repayment by the father of his debt to the bank. *Cf. Oddie* v. *National City Bank*, 45 N. Y. 735. The decision seems, therefore, incorrect, for if this had in fact been done, the bank would clearly be entitled to retain the amount as a purchaser for value without notice. *Cf. Swift* v. *Tyson*, 16 Pet. 1; 3 HARV. LAW REV. 138. No authority has been found on the exact point of the case.

BILLS AND NOTES — INDORSEMENT — GUARANTY. — The defendants, payees of a negotiable note, signed the following indorsement upon it: "For value received we hereby guarantee the payment of the within note at maturity, waiving demand, notice of non-payment, and protest." *Held*, that this operates as an indorsement with enlarged liability, and defendants are liable only on being charged as indorsers. *National Exch. Bank* v. *McElfresh Mfg. Co.*, 37 S. E. Rep. 541 (W. Va.).

This decision is supported by some authority. *Partridge* v. *Davis*, 20 Vt. 499; *Dunham* v. *Peterson*, 5 N. D. 414. The more widely accepted view, however, seems to be that such a contract operates only as an ordinary guaranty, not as an indorsement. *Central Trust Co.* v. *First National Bank of Wyandotte*, 101 U. S. 68; *Tuttle* v. *Bartholomew*, 12 Met. 452. This view seems correct, for the express and special contract clearly negatives the existence of the ordinary contract of indorsement which is implied by custom from the usual blank form of indorsement. This contract should have no different effect when upon the note than if it were a separate instrument. Moreover, though the contract here makes the point unessential in this case, demand and notice of non-payment are not necessary to charge the guarantor in such cases. *Walton* v. *Marcall*, 13 M. & W. 452; *Clay* v. *Edgerton*, 19 Ohio St. 549. *Contra*, *Douglas* v. *Reynolds* 7 Pet. 113, 126. Consequently, the rule adopted in the present case changes the whole nature of the contract, both inserting unintended conditions

on the guarantor's liability, and extending the scope of that liability to more remote holders. It is, therefore, not to be supported.

CARRIERS — GRATUITOUS TRANSPORTATION — FELLOW-SERVANT RULE. — The plaintiff, an employee of a street railway company, while riding home from work under a rule allowing employees to ride free of charge, was injured by the negligence of the motorman. *Held*, that at the time of the accident the plaintiff was a passenger and not a fellow-servant of the motorman, and was therefore entitled to recover. *Dickinson* v. *West End St. Ry. Co.*, 59 N. E. Rep. 60 (Mass.).

Unless the plaintiff, when the accident occurred, was engaged in the actual service of the defendant, or in some act closely connected with such service, it is generally held that the fellow-servant rule does not apply. *State* v. *Western R. R. Co.*, 63 Md. 463. A result opposed to that of the principal case was reached in two cases where the plaintiff was riding to his work instead of from it. *Seaver* v. *Boston & Maine R. R. Co.*, 80 Mass., 466; *Holmes* v. *Great Northern Ry. Co.*, [1900] 2 Q. B. 409. This difference in the facts, however, appears not to have influenced the courts, and seems insufficient to distinguish the cases. Accordingly, the first of these cases must be considered as overruled by the present decision. On the facts, the principal case is clearly within the rule stated above, and the result is therefore to be commended. *O'Donnell* v. *Alleghany R. R. Co.*, 59 Pa. St. 239.

CONFLICT OF LAWS — PENALTIES — STATUTORY LIABILITY OF DIRECTORS. — A South Dakota statute provided that directors of a corporation creating debts in excess of the subscribed capital stock should be individually liable to the full amount of the debt contracted. *Held*, that such liability is enforceable in Vermont against the estate of a deceased director of a South Dakota corporation. *Farr* v. *Brigg's Estate*, 47 Atl. Rep. 793 (Vt.).

Whether statutory liabilities not of a compensatory nature, which run in favor of individuals as distinguished from the state, are penalties unenforceable in other jurisdictions, is a question of some difficulty. The Supreme Court in *Huntington* v. *Attrill*, 146 U. S. 657, holds, in what may well be regarded an *obiter* discussion, that they are not penalties in the international sense, whereas the general rule in state courts is that they are. *Halsey* v. *McLean*, 12 Allen, 438; *O'Reilly* v. *New York, etc. R. R.*, 16 R. I. 388; *Coffing* v. *Dodge*, 167 Mass. 231. The principal case at first sight might seem to support the view of *Huntington* v. *Attrill*, *supra*, but is in reality distinguishable. The act of the directors to which the statute here relates is the creation of the debt; the damage resulting from non-payment is the whole amount. For this the statute provides compensation, and virtually makes the director surety from the beginning. *Field* v. *Haines*, 28 Fed. Rep. 919. In *Huntington* v. *Attrill*, however, the debt from the corporation already existed when the directors made their false report, and its value may or may not have been affected by it. Imposing in such case a liability for the whole debt is not giving compensation for the result of the directors' act, but fixing an arbitrary penalty. *Derrickson* v. *Smith*, 27 N. J. Law, 166. This distinction is overlooked in *First Nat. Bank* v. *Price*, 33 Md. 487, where a result opposed to that in the principal case is reached.

CONSTITUTIONAL LAW — EXTRADITION — POWER OF FEDERAL GOVERNMENT. — An act of Congress provided for the extradition of criminals in certain cases "to foreign countries or territories . . . occupied by or under the control of the United States." *Held*, that the act was constitutional as applied to the extradition to Cuba of a fugitive charged with having embezzled public funds. *Neeley* v. *Henkel*, 21 Sup. Ct. Rep. 302. See NOTES, p. 607.

CONSTITUTIONAL LAW — RETROACTIVE LAWS — FIFTH AMENDMENT. — A mortgage on cattle in Indian Territory had been executed by a non-resident, and recorded in the county where the cattle were. By the laws of Indian Territory this mortgage was of no effect against any third persons. A creditor of the mortgagor, with knowledge of the mortgage, attached the cattle, and got judgment; but the mortgagee had intervened and his claim had not been adjudicated, when Congress passed a statute for Indian Territory validating all such mortgages "heretofore executed." *Held*, that this statute is constitutional as against this attaching creditor. *Evans-Snider-Buell Co.* v. *McFadden*, 105 Fed. Rep. 293 (C. C. A., Eighth Cir.). See NOTES, p. 606.

CONTRACTS — CONSIDERATION VOID IN PART — RESTRAINT OF MARRIAGE. — The plaintiff agreed not to marry, and to act as housekeeper for the defendant during his life, in consideration that the defendant promised to provide enough to make her comfortable. *Held*, that the plaintiff, having fully performed, can recover on the contract, the promise not to marry, though void on grounds of public policy, not vitiating the entire consideration. *King* v. *King*, 59 N. E. Rep. 111 (Ohio). See NOTES, p. 614.

CONTRACTS — PART PAYMENT — UNLIQUIDATED CLAIMS. — *Held*, that an unliquidated claim is not discharged by the acceptance, in full satisfaction, of a sum less than the debtor admits to be due. *Huff* v. *Logan*, 60 S. W. Rep. 483 (Ky.).

The doctrine of *Foakes* v. *Beer*, 9 App. Cas. 605, that the payment of a lesser sum is no consideration for the relinquishment of a larger claim, is always stated to be inapplicable where the larger claim is unliquidated. *Wilkinson* v. *Byers*, 1 A. & E. 106; 12 HARV. LAW REV. 521–531. The basis of this distinction seems to be that as the claim was unliquidated, it might have turned out that the payment was full satisfaction. The exception has, however, been applied even where the amount paid was exactly what the debtor admitted to be due. *Ostrander* v. *Scott*, 161 Ill. 339; *Tanner* v. *Merrill*, 108 Mich. 58. These latter cases are indistinguishable on principle from the principal case and from *Foakes* v. *Beer*, *supra*. If the fact that the smaller amount is admitted to be due will prevent its being consideration for the abandonment of the whole claim, this should be true equally when the debtor pays all that he admits to be due, and the reason for the decisions in the ordinary case of unliquidated claims manifestly does not apply. The decision of the principal case is therefore to be commended from the point of view of uniformity.

CORPORATIONS — JUDGMENT AGAINST CORPORATION — LIABILITY OF STOCKHOLDERS. — The plaintiff, having recovered judgment against a corporation upon an *ultra vires* contract, proceeded against the defendant on the judgment under a constitutional provision making stockholders liable for dues of corporations. *Held*, that *ultra vires* contracts are not included within the term dues, and that accordingly the defendant is not liable. *Ward* v. *Joslin*, 105 Fed. Rep. 224 (C. C. A., First Cir.).

It is well settled that a judgment against a corporation is conclusive against its stockholders. *Thayer* v. *New England, etc. Co.*, 108 Mass. 523; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640. The principal case indicates a necessary exception that the judgment may be examined to see if the cause of action is one for which liability is imposed upon the stockholders. *Bohn* v. *Brown*, 33 Mich. 257; *Wilson* v. *Pittsburgh, etc. Co.*, 43 Pa. St. 424. The result reached by the court seems to be a fair interpretation of the constitutional provision. Without this there would be no liability whatever, and it should not be presumed that so sweeping a change was intended as to create liability for all corporate acts however unauthorized. It has been held that the defence of *ultra vires* is not open to stockholders in a suit by creditors of the corporation upon their unpaid stock subscriptions. *Baines* v. *Babcock*, 95 Cal. 581. But this is upon the ground that the creditor is thereby reaching assets of the corporation. This is inapplicable to the principal case, where the statutory liability sought to be enforced is owed by the shareholders directly to the creditors, and is in no way an asset of the corporation. *Whitman* v. *Oxford Nat. Bank*, 176 U. S. 559; 2 MOR. CORP., 2d ed., § 870.

CORPORATIONS — PUBLIC CORPORATIONS — GARNISHMENT. — *Held*, that the Board of Commissioners of the Yazoo and Mississippi Delta cannot be required to answer as garnishee, since it is a public corporation, organized for public purposes. *McBain* v. *Rodgers*, 29 So. Rep. 91 (Miss.).

Since the national and state governments cannot be made parties to suits in their own courts, they are not liable to answer as garnishees. *Buchanan* v. *Alexander*, 4 How. 20; *Stillman* v. *Isham*, 11 Conn. 123. Counties, being usually regarded as administrative subdivisions of the state, have likewise been exempted. *Ward* v. *County of Hartford*, 12 Conn. 404. Cities, however, have been treated as public corporations, rather than as subdivisions of the sovereign, and on that ground have sometimes been held subject to such process. *Newark* v. *Funk*, 15 Ohio St. 462. Counties have also been so regarded by some courts. *Adams* v. *Tyler*, 121 Mass. 380. The weight of authority, however, favors the exemption of municipalities and other public corporations because of the undoubted public injury and inconvenience which would result if all the debts of such a corporation were subject to garnishment. *Merwin* v. *Chicago*, 45 Ill. 133; *Hawthorn* v. *St. Louis*, 11 Mo. 59. Some decisions have distinguished be-

tween garnishment of the salaries of officials, which should clearly not be allowed, and garnishment of ordinary debts of the city. Such a distinction, while illogical, is perhaps practically justifiable. *Mayor of Jersey City* v. *Horton*, 38 N J. Law, 88.

CRIMINAL LAW — PLEA OF GUILTY — VACATING SENTENCE. — The defendant, on being indicted for receiving stolen property with knowledge that the same was stolen, pleaded guilty, and was sentenced to imprisonment. He subsequently moved the court to vacate the sentence, and for leave to withdraw his plea of guilty, and to plead not guilty. Evidence showed that he had all along denied having had guilty knowledge, and had pleaded guilty only because of the assurance of the prosecuting witness that the judge would set him free. *Held*, that the sentence should be vacated, and the defendant allowed to plead not guilty. *People* v. *Arkins* (Criminal Ct., Cook Co., Ill.), 33 Chicago Legal News, 192. See NOTES, p. 609.

EQUITY — BILL OF PEACE — DAMAGES. — Several actions at law for nuisance were begun against a smelting company by neighboring property owners. The company brought a bill to perpetually enjoin all these suits on the ground that certain facts alleged constituted a common legal defence to all the actions. The lower court dismissed the bill for want of jurisdiction, except as against three defendants, who waived objection on that score, and as against these found that the alleged defence to the actions at law was not made out. *Held*, that the defendants who submitted to the jurisdiction are entitled to have the equity court assess damages for the nuisance. *Ducktown Sulphur, etc. Co.* v. *Barnes*, 60 S. W. Rep. 593 (Tenn., Sup. Ct.). See NOTES, p. 611.

EQUITY — INJUNCTION — TRADE NAMES. — Plaintiffs for many years had used Nolan Bros. as a trade name in the retail shoe business. The defendant and his brother, who were of the same family name as plaintiffs, later opened a wholesale shoe business, adopting the same trade name. The brother retired from the firm, and the defendant soon after changed from a wholesale to a retail business, continuing to use the same name, with intent to mislead and deceive the public. *Held*, that defendant will be enjoined from using the name Nolan Bros. *Nolan Bros. Shoe Co.* v. *Nolan*, 63 Pac. Rep. 480 (Cal.).

It is well settled that a person has the right to conduct a business in his own name, although another person has previously engaged in the same business with the same trade name. *Burgess* v. *Burgess*, 3 De G. M. & G. 896. If apart from the mere use of his name, however, the defendant does anything calculated to deceive the public, and thereby induce people to trade with him in the belief that they are dealing with the prior user of the trade name, an injunction will issue against the continuation of these false representations, but not against the further use of the name. *Croft* v. *Day*, 7 Beav. 84, 89; *Halloway* v. *Halloway*, 13 Beav. 209. It would seem that within these limits motive is immaterial. A person should never be restrained simply from doing business in his own name. Hence in granting an injunction because of the dishonest intent of the defendant the principal case is erroneous. There is some support on authority, however, for making the decision turn on such intent. *England* v. *New York Pub. Co.*, 8 Daly, 375. The additional facts shown — that one member of the firm has retired, and that there has been a change from a wholesale to a retail business — should not deprive the surviving partner of the right to continue to use the original firm name.

EQUITY — INTERPLEADER — PERSONAL DEFENCE. — Certain property insured by the defendant company was destroyed by fire, and the plaintiff and B both claimed the benefit of the policy and brought actions against the company. By the terms of the policy there was a complete defence against B, because his action was begun more than a year after the loss. In the plaintiff's action the company admitted liability, but sought by motion under the New York Code to interplead the plaintiff and B. *Held*, that the motion should have been granted, since the defence against B was purely personal and could be waived by the company. *Grell* v. *Globe, etc. Co.*, 55 N. Y. App. Div. 612.

There being nothing in the terms of the Code provision to determine this question, the decision must, according to the usual interpretation of such statutes, be guided by the principles of an ordinary bill of interpleader. *Wilson* v. *Duncan*, 11 Abb. Pr. 3, 8. Thus considered, two objections must be answered. The prospects of the original plaintiff may be materially injured by allowing the company thus to waive its defence against the other claimant; but apparently the plaintiff should have no more right to object

than a creditor has when his debtor pays a debt barred by the statute of limitations. 2 BIGELOW, FRAUD, 135. Again, it may be said that the only proper basis for interpleader is the fact that the obligor can in no other way escape the risk and vexation of double litigation of which there is no serious danger here. But this is a narrow view of an equitable doctrine, and it seems better to allow the stakeholder to waive a personal bar and secure payment of the money to the claimant justly entitled. No authority has been found on the point, but the decision commends itself.

EQUITY — NUISANCE — INJUNCTION. — The plaintiff, owner of a tenement house in a business section of the city of New York, prayed that the defendant might be enjoined from so operating his electric lighting plant as to injure the plaintiff's premises by vibration and soot. *Held*, that an injunction should be denied, as it would cause serious injury to the defendant, and to the public at large, with but a relatively slight benefit to the plaintiff. *Riedeman* v. *Mount Morris Electric Co.*, 67 N. Y. Supp. 391. See NOTES, 14 HARV. LAW REV. 458.

EQUITY PLEADING — STATUTE OF LIMITATIONS — DEMURRER. — *Held*, that in equity the Statute of Limitations cannot be taken advantage of by demurrer, even though the face of the bill shows a cause of action which is barred. *Hubble* v. *Poff*, 37 S. E. Rep. 277 (Va.).

The rule stated in this case is generally followed in actions at law. *Stile* v. *Finch*, Cro. Car. 381. In equity, however, a demurrer is generally allowed where the bill itself shows that the statute has run. *Hoare* v. *Peck*, 6 Sim. 51; ANGELL, LIMITATIONS, 6th ed., § 294. The decision in the principal case seems nevertheless to be correct on principle, for, by compelling the defendant to plead the statute, the plaintiff is allowed to show facts in his replication bringing his cause of action within some of the exceptions enumerated in the statute, an advantage of which he is unjustly deprived if the plaintiff can demur successfully merely because the bill shows that the statute has run. This objection to allowing the plaintiff to demur under such circumstances was stated in a well reasoned English decision, *Aggas* v. *Pickerell*, 3 Atk. 225, and though the rule there laid down was not followed, it was afterward recognized to be correct and adopted as a rule of practice under the Judicature Acts. WILSON'S JUDICATURE ACTS, 3d ed., Order xix. Rule 18.

EVIDENCE — CONFESSIONS — ADMISSIBILITY. — The officer in charge of defendant induced him to make confessions by threatening to deliver him to a mob. *Held*, that the confessions were not voluntary, and should therefore be rejected. *Whiteley* v. *State*, 28 So. Rep. 852 (Miss.).

A confession to be admissible must be voluntary. *Regina* v. *Garner*, 1 Den. C. C. 329; *Regina* v. *Taylor*, 2 C. & P. 733. Stephen states that "no confession is deemed to be voluntary if . . . caused by any inducement, threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person. . . ." DIGEST OF EVIDENCE, p. 76. On the other hand, confessions are admitted when made because of actual fear not produced by those in authority, *Comm.* v. *Smith*, 119 Mass. 305; or because of inducements, either not relating to the accusation, *State* v. *Tatro*, 50 Vt. 481; or not offered by one in authority, *Regina* v. *Moore*, 2 Den. C. C. 522. Under the influence of such decisions the subject has been treated in a technical way, as though Stephen, though not professing to exclude the possibility of other involuntary confessions, actually enumerates all there can be. If so, the confessions in the principal case were voluntary, but notwithstanding this the fact that they were obtained by duress is sufficient to justify their exclusion, and they have always been excluded. *Miller* v. *People*, 39 Ill. 457; *Young* v. *State*, 68 Ala. 569. In every case where the question has arisen in the courts, however, such confessions are said to be involuntary, and there seems to be no objection to adding this to the other cases enumerated by Stephen.

EVIDENCE — HANDWRITING — DOCUMENTS FOR COMPARISON. — *Held*, that only such papers, purporting to bear the signature of the party whose signature was the subject of controversy, as were in evidence in the case for other purposes or were conceded to be genuine, are admissible for comparison ordinarily, though occasions may arise where the latitude of the rule should be extended. *Bane* v. *Guinn*, 63 Pac. Rep. 634 (Idaho).

Originally, at common law, any writing proved genuine was probably admissible. 1 GREENL. EV., 16th ed., § 578 a, note 2; *Allesbrook* v. *Roach*, 1 Esp. 351. In later years,

distrust of the jury and a desire not to complicate the issues led to the restriction of the rule in some cases to writings already in the case, *Doe* d. *Perry* v. *Newton*, 5 A. & E. 514; and the subject became much confused. See *Doe* d. *Mudd* v. *Suckermore*, 5 A. & E. 703. American courts are in hopeless conflict, the majority, perhaps, favoring the rule of *Doe* d. *Perry* v. *Newton*, *supra*. *Randolph* v. *Loughlin*, 48 N. Y. 456; *Kernin* v. *Hill*, 37 Ill. 209. Others admit also writing of undisputed genuineness. *Macomber* v. *Scott*, 10 Kan. 335. The unsatisfactory state of the law in England was remedied by statutes, allowing comparison "with any writings proved to the satisfaction of the judge to be genuine." 17 & 18 VICT. c. 125, § 27. Statutes to the same effect are common in this country, while some courts have reached the same result without a statute. *Moody* v. *Rowell*, 34 Mass. 490. Such a rule seems preferable to that in the principal case.

EVIDENCE — WITNESSES — SCOPE OF CROSS-EXAMINATION. — *Held*, that a party has no right to cross-examine any witness, except as to facts connected with matters stated in the direct examination. *State* v. *Hatfield*, 37 S. E. Rep. 626 (W. Va.).

The principal case adopts the practice followed in the Federal courts, and in probably a majority of the state courts. *Philadelphia, etc. R. R. Co.* v. *Stimpson*, 14 Pet. 448, 461; *People* v. *The Court, etc.*, 83 N. Y. 436, 459. In England, however, a witness called by one party to prove the simplest fact may be cross-examined by the adverse party on every issue of the case. *Dickinson* v. *Shee*, 4 Esp. 67. And this is the practice in a few of our states. *Moody* v. *Rowell*, 17 Pick. 490, 498; *State* v. *McGee*, 55 S. C. 247. Upon practical grounds the English rule, although it allows the cross-examiner to prove his case by leading questions, seems preferable. It avoids a distinction between facts connected with matters stated in the direct examination and facts not so stated, which is often difficult to draw, and is always the source of unprofitable quibbling. The English practice, moreover, is more conducive to the ascertainment of the truth; since by giving the cross-examiner a free hand, the opportunity for concealment or fabrication by the witness is materially lessened. THAYER, CAS. ON EV., 2d ed., 1207, 1222–1225. The decision of the principal case is, therefore, to be regretted.

EVIDENCE — WITNESSES — WAIVER OF PRIVILEGE. — *Held*, that the defendant in a criminal prosecution, by offering himself as a witness in his own behalf, does not waive his privilege not to answer incriminating questions asked to impeach his credibility. *Bachner* v. *State*, 58 N. E. Rep. 741 (Ind.).

It is often stated that a defendant in a criminal prosecution, when he elects to testify, has the same rights as other witnesses. But where an ordinary witness may refuse any testimony tending to incriminate, the defendant is generally compelled to answer to all questions, which, on other grounds, might properly be asked in cross-examination. *Commonwealth* v. *Mullen*, 97 Mass. 545. As the defendant's permission to testify may properly be granted only on condition that he clear up the whole matter, and not prejudice the jury in his behalf by testimony on certain facts only, this broad waiver is clearly justified. However, concerning questions merely touching his credibility, his privilege ought still to exist. No concealment of pertinent facts would thereby result, and otherwise the jury might be unfairly prejudiced by the defendant's commission of entirely distinct crimes. This distinction between questions relevant to the issue, and those affecting credibility, which the principal case in effect recognizes, is accepted by most of the authorities. *Clarke* v. *State*, 78 Ala. 474; *People* v. *Pinkerton*, 79 Mich. 110.

HABEAS CORPUS — REMOVAL OF CHILD BEYOND JURISDICTION. — Defendant, intrusted with a child in New York, bound it out to service in another state. *Held*, that a writ of *habeas corpus* will not issue in New York to compel its delivery to the father. *People ex. rel.* v. *New York Juvenile Asylum*, 68 N. Y. Supp. 279 (Sup. Ct., App. Div., First Dept.). See NOTES, p. 612.

INSURANCE — EXECUTION FOR CRIME — INNOCENCE OF INSURED. — The insured, though in fact innocent, was convicted of a capital crime by a court of competent jurisdiction and executed. The policy, which contained no provision for forfeiture in the event of execution for crime, had been taken out by the insured for the benefit of his wife, and later assigned to creditors of the insured. *Held*, that they cannot enforce the policy. *Burt* v. *Union, etc. Ins. Co.*, 105 Fed. Rep. 419.

The decision is rested on the ground that to permit a recovery in such a case would

tend to encourage a want of confidence in the efficiency of our courts. Yet by a decided preponderance of authority a judgment rendered in a criminal prosecution cannot be received in a civil cause as evidence of the facts on which it is based, although the same questions of fact may be in issue in both. *Betts* v. *New Hartford*, 25 Conn. 180; *Corbley* v. *Wilson*, 71 Ill. 209. *Contra*, *Anderson* v. *Anderson*, 16 Am. Dec. 237, 238. Moreover the decision cannot be supported on any ground. It is well settled that if the insured takes out a policy for his own benefit and suffers death because of a crime committed by him, his personal representatives or those claiming under him cannot enforce the policy. *Amicable Society* v. *Bolland*, 4 Bligh, 194; *Ritter* v. *Mutual Life Ins. Co.*, 169 U. S. 139. Where, however, the plaintiffs claim in their own right, they can recover even though the death has resulted from the commission of a crime by the insured. Thus where the policy is made payable to the wife of the insured, and he commits the crime of suicide, she can enforce it. *Morris* v. *Life Assurance Co.*, 183 Pa. St., 563, 572; *Darrow* v. *Family Fund Society*, 116 N. Y. 537. See, also, *Seiler* v. *Life Association*, 105 Iowa, 87, 93. The reason for the difference between the two classes of cases seems to be that public policy is against allowing the insured's estate to derive a benefit from his crime. But this policy breaks down where a third party is suing in his own right. The principal case is therefore wrong, both because the insured was innocent, and because the suit is brought in the right of a named beneficiary other than the insured.

JUDGMENTS — PARTIES — SETTING ASIDE DECREE OF DIVORCE. — In 1894 A secured a divorce from B, and later married C, who died intestate in 1897. C's heirs at law brought suit to set aside the decree of divorce for fraud, to prevent A from acquiring C's estate, which would otherwise descend to them. *Held*, that the plaintiffs, being strangers to the divorce suit and having no interest therein, cannot maintain this action. *Tyler* v. *Aspinwall*, 47 Atl. Rep. 755 (Conn.).

Some courts hold that a decree of divorce is final and can never be set aside, even under a general statute allowing the reopening of judgments. *O'Connell* v. *O'Connell*, 10 Neb. 390. This rule rests upon the inconvenience which would result to the collateral rights of third parties. *Parish* v. *Parish*, 9 Ohio St. 534. The general rule, however, is that judgments in divorce suits, like those in any other action, may be vacated by proper application, on showing good cause. *Holmes* v. *Holmes*, 63 Me. 420; *Johnson* v. *Coleman*, 23 Wis. 452. But the right to interfere with a judgment is generally limited to parties to the action, *Drexel's Appeal*, 6 Pa. St. 272, and while there are some instances where a third party can have a judgment vacated, he must show a direct injury to his interests by the fraudulent decision. *Shallcross* v. *Deats*, 43 N. J. Law, 177. In the principal case, the interest of the plaintiffs in the judgment attacked was indirect, since it did not in itself affect them, and the court therefore properly declined to entertain their action.

PATENTS — INFRINGEMENT — SHIPMENT FOR SALE ABROAD. — The defendants *bona fide* purchased articles made in infringement of the plaintiff's patent, and shipped them to their agent in Paris, where they were sold. *Held*, that as the defendants had the articles in their possession for purposes of resale, they are liable for an infringement, although there was no actual exposure for sale in England. *British Motor Syndicate* v. *Taylor*, [1901] 1 Ch. 122.

The defendants' liability necessarily depended upon whether or not their possession of the articles in England amounted to an infringement, for the sale in Paris could not infringe an English patent. *Brown* v. *Duchesne*, 19 How. 183. Mere possession of an article made in infringement of another's patent is not necessarily an infringement. *Noebel's Explosives Co.* v. *Jones*, 8 App. Cas. 1. It is, however, if the possession is so used as to threaten the exclusive rights given by the patent. *United Telephone Co.* v. *London, etc. Co.*, 26 Ch. D. 766, 776. The innocence of the infringer is, of course, immaterial. *Parker* v. *Hulme*, 1 Fish. Pat. Cas. 44. In the principal case the defendants used their possession to forward articles made in infringement of the plaintiff's patent to a point outside England, where they could be sold with impunity. This action was clearly a user of possession which encroached upon the exclusive right "to make, use, exercise, and vend" given the plaintiff by his patent, and the decision is therefore correct.

PROPERTY — EJECTMENT — PRIOR POSSESSION OF PLAINTIFF. — *Held*, that proof of possession, at the time of ouster by the defendant, at least if under color of right, raises a presumption of title sufficient to maintain ejectment against a mere intruder. *Bradshaw* v. *Ashley*, 21 Sup. Ct. Rep. 297.

In actions of ejectment where the plaintiff has not been in possession of the land, or the defendant occupies under a claim of title, the plaintiff can show a right to possession only by connecting himself with the legal title. *Greenleaf* v. *Brooklyn, etc. Co.*, 141 N. Y. 395. See 10 AM. & ENG. ENCY. OF LAW, 2d ed., 481. But where the defendant, a mere intruder without color of right, has ousted the plaintiff from actual possession, it is sufficient for the plaintiff to show prior possession and ouster. *Davidson* v. *Gent*, 1 H. & N. 744. In such cases the plaintiff recovers, not because possession raises a presumption of title, but because possession even of a wrongdoer is sufficient title to maintain ejectment against a subsequent intruder. *Cf. Asher* v. *Whitlock*, L. R. 1 Q. B. 1. The reasoning of the court in the principal case is unfortunate, since, if prior possession merely raises a presumption of title, the plaintiff would be defeated on proof of an outstanding title, and such an interpretation of similar erroneous language has been applied in some cases where the defendant had ousted the plaintiff without color of right. See *Nagle* v. *Shea*, 8 Ir. Rep. C. L. 224.

PROPERTY — EQUITY — MORTGAGE ON FUTURE PROPERTY. — One X leased a brickyard from the plaintiff, giving him a mortgage of the clay in the bank, and the brick he should make therefrom, for any unpaid rent. The defendant, without notice of the mortgage, bought from X bricks subsequently made. *Held*, that the mortgage did not create a lien on these bricks. *Townsend, etc. Co.* v. *Allen*, 62 Pac. Rep. 1008 (Kan.).

Mortgages on unsown crops, to be grown on the mortgagor's land, have been held good in a number of jurisdictions. *Briggs* v. *United States*, 143 U. S. 346. Also a mortgage of butter and cheese, to be made on a certain farm, has been held good. *Conderman* v. *Smith*, 41 Barb. 404. In these cases, it is true, the claimants against the mortgages were not purchasers for value without notice, but although this fact is material in equity, it should not affect the question at law, and the language used by the courts is commonly broad enough to cover the case of a purchaser. Moreover, such a mortgage has been maintained against a subsequent mortgagee who got possession. *Harris* v. *Jones*, 83 N. C. 317. On the other hand, the principal case, which is not decided on the ground that defendant was a purchaser, is supported, in refusing to extend the doctrine of potential existence beyond actually growing crops, by the decisions of several states. *Hutchinson* v. *Ford*, 9 Bush, 318; *Cole* v. *Kerr*, 19 Neb. 553. In England, also, the whole doctrine is now abolished by the Sales of Goods Act, 1893, sect. 6, subsect. 3. On principle such a lien is equitable in its nature, since the mortgagee clearly cannot acquire the legal title to a non-existent article, and the whole subject should be left to equity. *Cf. Holroyd* v. *Marshall*, 10 H. L. Cas. 191.

PROPERTY — WILLS — DOUBLE INHERITANCE TAX. — A father devised certain freehold estates to his son. After the execution of the will and in the lifetime of the father, the son died leaving issue which survived the father, and devising his property to trustees on certain trusts. The crown claimed an inheritance tax on the real estate from the executors both of father and of son. *Held*, that, as the property by the Wills Act, § 33, passed under both wills, it was subject to two inheritance taxes. *Re Scott*, 83 L. T. Rep. 613. See NOTES, p. 615.

SALES — RETENTION OF TITLE — RISK OF LOSS. — A piano was sold and delivered, and notes given for it containing a stipulation that the title should remain in the vendor until payment in full. While in the possession of the vendee the piano was accidentally destroyed. *Held*, that the notes need not be paid. *Bishop* v. *Minderhout*, 29 So. Rep. 11 (Ala.).

The decision is against the weight of authority, and incorrect on principle. Since the transaction is intended as a substitute for a sale and mortgage back, and in other respects has that effect, the risk of loss, following the analogy, should be on the vendee. *Topp* v. *White*, 12 Heisk. 165; *Tufts* v. *Wynne*, 45 Mo. App. 42. *Contra*, *Randle* v. *Stone & Co.*, 77 Ga. 501. This rule of course should be applied only to cases where the title is held back for security, although one decision has carried it farther. *Hesselbacher* v. *Ballantyne*, 28 Ont. 182. The doctrine of the principal case has led to decisions that such notes are not absolute promises to pay, and therefore not negotiable. *Sloan* v. *McCarty*, 134 Mass. 245. But there is equal authority the other way. *Chicago Railroad Equipment Co.* v. *Merchants' Bank*, 136 U. S. 268. Moreover, the latter view seems preferable, even though it be held that the vendee need not pay if the goods are destroyed, for the true ground, if any, of such a decision would seem to be not the breach of a condition, but rather failure of consideration, which is an equitable defence not good against an indorsee. *Robinson* v. *Reynolds*, 2 Q. B. 196.

SURETYSHIP — PARTNERSHIP — NOTICE OF DISSOLUTION. — The defendant was guarantor of the debts of a firm, from which one partner withdrew without giving notice to the plaintiff. In a suit by the latter on a claim subsequently accruing, *held*, that the defendant was discharged from his guaranty. *Byers* v. *Hickman Grain Co.*, 84 N. W. Rep. 500 (Iowa.).

It is settled law that where there is a guaranty of partnership debts the withdrawal of any member of the firm discharges the guarantor, unless the guaranty in its terms covers the debts of the firm's successors. *Backhouse* v. *Hall*, 6 B. & S., 507; *Simson* v. *Cooke*, 8 Moore, 588. In the principal case, it is true, as no notice had been given to the plaintiff, the members of the old firm were all estopped to set up the fact of its dissolution. *Dickinson* v. *Dickinson*, 25 Gratt. 321; *Pecker* v. *Hall*, 14 Allen, 532. This, however, cannot affect the result. The guarantor can be held only to the strict letter of his undertaking, which was to guarantee the debts of a certain firm, and no negligence on the part of the firm can estop the guarantor from showing the dissolution of this firm and his consequent discharge. This result was reached in another case involving the same principle. *Manhattan Gas Light Co.* v. *Ely*, 39 Barb. 174.

TORTS — LOOK AND LISTEN RULE — CONTRIBUTORY NEGLIGENCE. — The plaintiff failed to look before crossing defendant's car track, and was run into. The lower court charged that if a person who had looked would reasonably have thought it safe to cross, plaintiff was not contributorily negligent, and a verdict was found for the plaintiff. *Held*, that the charge was erroneous. *Dummer* v. *Milwaukee Ry. & Light Co.*, 84 N. W. Rep. 853 (Wis.).

Failure to look and listen has frequently been held sufficient negligence in itself to bar a recovery. *Ward* v. *Rochester Electric Ry. Co.*, 17 N. Y. Supp. 427. See 13 HARV. LAW REV. 226. In such cases, however, no question has been raised whether such want of care contributed to the injury. When this question is distinctly left to the jury, which finds, as here, that the negligence was not part of the cause of the accident, it seems unjustifiable to rule that as a matter of law the plaintiff was guilty of contributory negligence, since the whole theory of such negligence is based on such a relation of legal cause. *Tuff* v. *Warman*, 5 C. B. N. S. 573. Though certain acts may be held, by established precedent, to be negligent *per se*, by no rule or precedent can they be made a direct cause of the accident.

TRUSTS — PLEADING — SUIT AT LAW AGAINST TRUSTEE. — The plaintiff sued the defendant as trustee for an injury caused by the negligence of an employee of the trust estate. *Held*, on demurrer, that the action should have been against the defendant in his personal, not in his representative capacity. *Parmenter* v. *Barstow*, 47 Atl. Rep. 365 (R. I.). See NOTES, p. 608.

REVIEWS.

CONFLICT OF LAWS; or, Private International Law. By Raleigh C. Minor, Professor of Law in the University of Virginia. Boston: Little, Brown & Co. 1901. pp. lii, 575.

Owing to the ever-increasing intercourse between states having different laws, and the consequent variety of questions continually arising, conflict of laws is beginning to rank among the important branches of the law, and yet, in proportion to its importance, the number of American text-books on the subject has been surprisingly small. One may therefore predict with confidence that Mr. Minor's book on this difficult, important, and interesting topic will meet with a hearty welcome by the legal profession.

The great foundation and basic principle on which the author rests his exposition of the law is *situs*. "Every element of every transaction